

FILED

UNITED STATES DISTRICT COURT
ALBUQUERQUE, NEW MEXICO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

SEP 29 2005

TONI WITT,

Plaintiff(s),

vs.

**CHARLES EUGENE PERDUE and
ALBERT ERNEST YOUNG,**

Defendant(s).

MATTHEW J. DYKMAN
CLERK

**CIVIL NO.04-207 RB/LFG
consolidated with
04cv1179RB/LFG**

**FINDINGS AND RECOMMENDATIONS IN RESPONSE TO PLAINTIFF WITT'S
OBJECTIONS AND AMENDED OBJECTIONS TO THE FINDINGS OF THE
MAGISTRATE JUDGE**

This matter came before the Court on Defendant Albert Ernest Young's Motion to Dismiss Plaintiff's Complaint Under Rule 37 of the Federal Rules of Civil Procedure (Docket No. 45). The Court filed Findings and Recommendations of the Magistrate Judge on August 15, 2005. (Docket No. 24¹) Plaintiff filed objections to those findings on August 24, 2005 (Docket No. 26) and amended objections (Docket No. 27) on September 1, 2005.

Plaintiff raises two direct factual challenges to the findings of the Magistrate Judge. First, Plaintiff questions the Magistrate Judge's finding that no rotator cuff tear was found during the Plaintiff's first surgery. Plaintiff references the medical records of Dr. Wayne Keeling (December 23,

¹The out-of-sequence docket number results from the consolidation of these two cases. The Defendant's motion was filed under the original docket number, 04cv207. The Magistrate Judge's findings and Plaintiff's objections were filed after consolidation and are the 24th, 26th and 27th entry under docket number 04cv1179.

2002); Dr. Frank Rowan (April 9, 2002); and Dr. Gary Poehling (January 13, 2002). None of the above cited records involve surgery, however, as the first surgery occurred on January, 2003. The doctors cited by Plaintiff were interpreting MRIs or other diagnostics, and the Court is well aware that they believed, before surgery, that the films in question showed a partial tear. In fact, the pre-operative diagnosis for Plaintiff was "Right shoulder impingement syndrome, possible rotator cuff tear." (See Exhibit 1, attached hereto.) In his surgical report, Dr. Ethan Wiesler reported that he inspected the rotator cuff and it was found to be intact. Dr. Wiesler's post operative diagnosis was "Right shoulder impingement syndrome." The Plaintiff's objection on this ground is not well taken.

Plaintiff further contests the Magistrate Judge's findings that in November of 2003 Plaintiff fell during a scuffle with her sons and reinjured her right shoulder. Plaintiff claims that that incident actually occurred in November of 2004, which would place the incident after all three of Plaintiff's surgeries. Plaintiff's second surgery occurred on December 16, 2003, and during that surgery a rotator cuff tear was observed and repaired. The significance of the date of injury is clear. If the rotator cuff was not torn in January 2003, but a tear was found in December 2003, five weeks after Plaintiff fell and reported to her doctor that she had reinjured her shoulder, the December surgery would be linked to that fall, not to the automobile accident of 2001.

Notwithstanding the critical importance of the date of the injury, Plaintiff's objections merely state that it occurred in 2004, and no effort was made to attach the relevant medical documents that are readily accessible in the file. Those documents are attached here as Exhibit 2, and they show clearly that the incident in question occurred in 2003, five or six weeks before the second surgery, as was stated in the original recommended findings. The Court further notes that the same mistaken date is the foundation for Dr. John P. McGee's April 13, 2005 report, to which Plaintiff refers in her

objections. To the extent that Dr. McGee based his opinion on the mistaken belief that Plaintiff fell and reinjured her shoulder in November 2004, rather than November 2003, his opinion has no evidentiary value. Plaintiff's objection on this ground is not well taken.

Plaintiff also reiterates that she was an innocent victim of the accident, and therefore should be compensated. This argument misses the point of the issue before the Court. At no time has the Court held the Plaintiff responsible for causing the initial injury she sustained in the accident. At issue is Plaintiff's conduct during discovery, and her lack of candor in providing information to the Defendant and in her representations to the Court. The Court does not accept Plaintiff's assertion that the errors in her answers to interrogatories were "minor and irrelevant." To the contrary, they went to the heart of her damages claim.

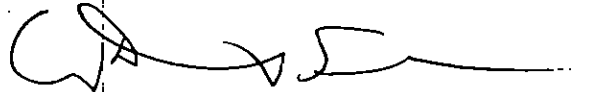
Furthermore, Plaintiff was not forthright in her response when asked about subsequent shoulder injuries during her deposition. Plaintiff was asked directly whether she had fallen and hurt her right shoulder since the accident. She answered "No." (See Exhibit 3, Plaintiff's deposition transcript, p. 80, lines 9-11) Plaintiff was then confronted by Defense counsel with her January 2004 medical records relating to a shoulder injury resulting from a fall at church. After a colloquy that can best be described as quibbling over the definition of "fall", ("I just kind of leaned up against the car. I never fell down, down." p. 81, lines 18-19) Plaintiff finally admitted that she did go to the hospital to seek treatment after this incident, and that she should have revealed this in her answers to interrogatories.

Immediately thereafter, Defense counsel asked Plaintiff "Did you ever get into an altercation with you son and hurt your shoulder?" Plaintiff's response was again unequivocal: "No." (p. 83, lines 9-11) Only when confronted with additional hospital records did Plaintiff admit that the correct

answer to the question was "yes." (p. 83, line 19) These responses belie Plaintiff's claim in her objections that she was "candid in all of her answers" at her deposition. To the contrary, the Court continues to believe that Plaintiff was intentionally deceptive, particularly with regard to subsequent injuries to her shoulder. Furthermore, the Court stands by its original conclusion that Plaintiff failed to reveal her subsequent shoulder injuries in an attempt to increase the monetary value of her damages claim by creating the false impression that all three of her surgeries resulted directly from the automobile accident.

The Court remains concerned about the conduct of Plaintiff's attorney. As shown above, the medical records are clear as to the sequence of injuries and treatments. Yet, Plaintiff's attorney, through design or failure to properly ascertain that sequence, continues to argue facts before the Court which are inaccurate.

In the Court's opinion Plaintiff's objections are not well taken. The Court stands by its original findings and recommendations.

A handwritten signature in black ink, appearing to read 'W. Daniel Schneider', is written over a horizontal line.

W. DANIEL SCHNEIDER
United States Magistrate Judge

EXHIBIT 1

FOREST UNIVERSITY HOSPITAL MEDICAL CENTER
MEDICAL CENTER BOULEVARD
WINSTON-SALEM, NC 27157

NAME: WHITT, TONI LARAE
NCBH#: 01687856

THIS IS A CONFIDENTIAL REPORT PRINTED FROM LASTWORD AND MAY BE UNAUTHENTICATED.
Do not release without patient, legal representative or proper authorization.
Please place in patient record or discard by shredding or tearing to protect
patient confidentiality.

REFERENCE: Medical Center's Confidentiality Agreement Covering Disclosure of
Patient/Provider Information and Computer Access and Responsibilities.

OP

OPERATIVE NOTE

WHITT, TONI LARAE
NCBH # 168-78-56

Ethan Ron Wiesler, MD
Date 01/16/2003
Room AMBS

PREOPERATIVE DIAGNOSIS: Right shoulder impingement syndrome, possible
rotator cuff tear.

POSTOPERATIVE DIAGNOSIS: Right shoulder impingement syndrome.

PROCEDURE: Arthroscopic subacromial decompression.

ATTENDING SURGEON: Ethan Wiesler, M.D.

ASSISTANT: Derrick Hickey, M.D.

ANESTHESIA: Regional.

ESTIMATED BLOOD LOSS: Minimal.

COMPLICATIONS: None.

INDICATIONS FOR PROCEDURE: Toni Whitt is a 39-year-old right hand dominant
female with a long history of right shoulder pain exacerbated by overhead
activity. Physical examination was consistent with impingement syndrome
and possible rotator cuff tear. Magnetic resonance imaging demonstrated a
possible tear of the supraspinatus tendon, which was probably partial
thickness.


DESCRIPTION OF PROCEDURE: Following induction of regional anesthetic by the
Anesthesiology Service the patient was placed in the beach chair position
on the operating room table. All bony prominences were padded.

Arthroscopic evaluation of the joint was performed from the usual
① glenohumeral posterior portal. There was no intraarticular pathology noted.
Attention was turned to the insertion of the supraspinatus tendon and it
appeared to be well fixed to the greater tuberosity with no evidence of a
full thickness rotator cuff tear. Following this the arthroscope was
placed in the subacromial space. The bursa was found to be quite
hypertrophic. A full bursectomy using the Arthricare ablation was performed
as well as the shaver used to take the bursa completely from the lateral
aspect of the acromion medially to the acromioclavicular joint. The
acromioclavicular joint was identified but not debrided. Following a full
bursectomy once again the supraspinatus tendon was well as the

EXHIBIT

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FOREST UNIVERSITY  BAPTIST MEDICAL CENTER
MEDICAL CENTER BOULEVARD
WINSTON-SALEM, NC 27157

NAME:  WHITT, TONI LARAE
NCBH#:01687856

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rotator cuff were examined from the bursal side and found to be intact.
The patient tolerated the procedure well. A sterile dressing was applied
and the patient was brought to the recovery room.

ATTENDING SURGEON

DGH/kf D 02/19/2003 T 02/21/2003 R 02/22/03dp Doc # 1431688 Job #
235305

cc: Ethan Ron Wiesler, MD
WFU Baptist Medical Ctr

LABEL: TRXMSTR

COPY

PRINTED 10/18/20
BY HESTER, MARLE



MED 000103

EXHIBIT 2

WITT, TONI
 DOB: 9/15/1968 Age: 40 Sex: F Race: W Height: 5'2" Weight: 130 lbs Eyes: BR Hair: BR
 MRN: 4010697862 TE OF SERVICE: 11/27/2003
 Pres Time: 09:55
 Triage Time: 10:03
 BP: 102/68 HR: 78 RR: 18 SpO2: 98%
 Allergies: NK
 EOP: SEVA SACK
 COMPLAINT: SHOULDER PAIN
 SIGNS: albuterol inhaler pm, singular 10mg 1 qd
 Regular / Unlabored / Normal / Asymptomatic
 Pain Scale: 9

HISTORY OF PRESENT ILLNESS

Examiner: 10³⁰ Patient: Family EMS NH Translator: Limited by ALOC Intoxication Severity Dementia

C/C/HPI: (Narrative): 60 lbs Under Pain. Thinks pulled something, possibly few days ago.
 Prior Rotator Cuff Surgery 10 months ago

Onset: Sx started suddenly gradually 2 min. / hrs. days / wks. ago : continuous / intermittent

Duration: Sx last min. / hrs. / days / wks. at a time : present / absent

Location: R Shoulder humerus elbow forearm L shoulder humerus elbow forearm

Quality: cannot describe "pain" swollen redness laceration numbness tingling

Severity: mild moderate severe 1-10 scale

Context: accident sports related fall altercation spontaneous MVA

Exacerbated by: nothing movement palpation Relieved by: nothing rest OTC meds

Associated Symptoms: none pain bleeding swelling fever joint pain

REVIEW OF SYSTEMS

System	Findings	System	Findings
Constitutional	fever chills weakness diaphoresis	Neurological	HA seizures weakness confusion
EENT	sore throat ear pain facial pain	Psychological	anxious depressed
Eyes	pain visual changes	Endocrine	polyuria polydipsia
Cardiovascular	C.P. palpitations DOE PND	Musculoskeletal	rashes pruritis lesions
Respiratory	S.O.B. cough congestion	Hematologic	anemia bleeding disorders transfusion
Gastrointestinal	N/V D/C pain melena hematemesis	Allergy/Immun	frequent infections allergies rashes
GU	flank pain dysuria hematuria frequency	Other	
Musculoskeletal	joint pain neck / back pain ext pain		

YES NO All Other Systems Reviewed And Are Negative

MEDICAL AND SOCIAL HISTORY

Med. Hx: none CAD HTN IDDM / NIDDM shoulder dislocation bursitis

Past Med. Hx: asthma

Med: albuterol inhaler pm, singular 10mg 1 qd

Allergies: nka

Surgical: none Appy Chole Hyster

Family Hx: negative

Social Hx: Tobacco Y/N Packs/Day Years

ETOH: Y/N S Drinks/Wk.

Drugs: Y/N

Occupation:

Vaccinations: Up-to-date: Y/N

Tetanus: under 5 yr

MED 000389

Reproductive Hx: LMP: 2 WKS AGO

G

P

AB

Me. Memorial Hospital of Maine

(Instructions: circle positive - slash negative, provide additional pertinent information.)

ME WITH TONI
 DOB: 9/15/1963 Age: 40 yrs. 0 mos. 0 wks. 0 days MR#: 4010701482 DATE OF SERVICE: 11/30/2003
 Sex: F Race: W Height: 5'2" Weight: 120 lbs. Pres. Time: 12:00 PM
 Chief Complaint: SHOULDER INJURY/PAIN
 Medicines: albuterol inhaler pm, singulair 10mg qd
 Allergies: nka
 EOP: E. BRAN GORDON BLA ROP: STUNES, A. FLY, S. BLA
 Arrival Mode: AMBL. BOY
 PO: Regular
 Unlabored
 BP: 131/87
 SAO2: 97%
 Normal / Awake

HISTORY OF PRESENT ILLNESS

Exam: Initial History (Patient) Family EMS NH Translator Smiles ALOC Intoxication Severity Dementia

C / C / HPI: (Narrative):

R shoulder pain, R hand pain
 w/o rotator cuff injury. Pt stated
 was accidentally hit R shoulder
 does not recall what injury to R
 hand, but pain

Timing: Sx started suddenly / gradually 1 1/2 min. (hrs) / days / wks. ago : continuous / intermittent

Duration: Sx last 1 1/2 min. (hrs) / days / wks. at a time : present / absent

Location: R Shoulder humerus elbow forearm L shoulder humerus elbow forearm

Quality: cannot describe "pain" swollen redness laceration numbness tingling

Severity: mild moderate severe 1-10 scale

Context: accident sports related fall altercation spontaneous MVA

Relieved by: nothing movement palpation Relieved by: nothing rest OTC meds

Assoc. Signs & Symptoms: none pain? bleeding swelling fever joint pain

REVIEW OF SYSTEMS

Constitutional: fever chills weakness diaphoresis Neurological: HA seizures weakness confusion
ENT: sore throat ear pain facial pain Psychological: anxious depressed
Eyes: pain visual changes Endocrine: polyuria polydipsia
Cardiovascular: C.P. palpitations DOE PND Musculoskeletal: rashes pruritis lesions
Respiratory: S.O.B. cough congestion Immunologic: anemia bleeding disorders transfusion
Gastrointestinal: N/V D/C pain melena hematemesis Neurologic: frequent infections allergies hives
GU: flank pain dysuria hematuria frequency
Integumentary: joint pain neck / back pain ext. pain

YES / NO All Other Systems Reviewed And Are Negative

MEDICAL AND SOCIAL HISTORY

Medical: none CAD HTN IDDM / NIDDM shoulder dislocation bursitis

Respiratory: asthma

Medic: albuterol inhaler pm, singulair 10mg qd

Allergies: nka

Surgical: none Append Chole Hyster R Rotator Cuff

Family: negative

Social: Tobacco Y / N Packs/Day Years

ETOH: Y / N Drinks/Wk.

R / L Handed Lives Alone: Y / N
 Drugs: Y / N

Occupation: R / L

Immunizations: Up-to-date: Y / N

Tetanus: under 5 yr

Op: Obst: LMP: 2 WKS AGO

G

P

AB

EXHIBIT 3

rt v. Perdue
roni Witt

CIV-04-0207-WDS/LFG
February 4, 2005

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1 **A. Yes, she did.**
2 Q. And in what ways did she harass you at this
3 job?
4 **A. When we got married, he bought me a car, and**
5 **she was there like every morning when I got there,**
6 **every lunch break, every day at 5 o'clock, telling**
7 **me, "This is my F-ing car now. You won't never have,**
8 **you won't never have him." Just stuff like that.**
9 Q. And that was the reason, then, that you had
10 to stop working at that trucking company?
11 **A. That is the reason I quit working.**
12 Q. And when you quit working for them, for light
13 duty, who was your next employer?
14 **A. It would have been a trucking company.**
15 Q. That would have been Direct Transport?
16 **A. Mm-hmm.**
17 Q. And after you left Direct Transport, what was
18 the next company that you worked for?
19 **A. Liberty Screen Printing, I think.**
20 Q. And then after Liberty Screen, who was your
21 next person that you worked for?
22 **A. Should have been Happy Days.**
23 Q. Then who did you work for?
24 **A. I was out for a little while from my**
25 **surgery. Then I went back to -- maybe I had already**

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1 **had my surgery before I worked for Happy Days. And**
2 **then I went and worked for Happy Days, and then it**
3 **was for People's General Store.**
4 Q. And then after People's General Store, who
5 did you work for?
6 **A. I was out of work again for surgery.**
7 Q. Okay. Have you worked at all in the year
8 2005?
9 **A. No.**
10 Q. Have you been released to do any light duty
11 in 2005?
12 **A. No.**
13 Q. Okay. We've been going for about another
14 hour. Would you like to take a lunch break now?
15 MR. CAMACHO: No. She has to get back
16 on a bus, go back to North Carolina.
17 MR. HILL: We'll go for a while, we'll take a
18 small break to get a sandwich, then we'll continue.
19 (Recess taken.)
20 Q. Let's go back to the Answers to
21 Interrogatories. We've gone to No. 9. Let's go to
22 No. 10.
23 **A. Go to No. 107**
24 Q. Yes. It indicates there, "Have you ever been
25 involved in any incident or accident, motor vehicle,

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1 on-the-job, or otherwise, resulting in injuries or
2 damages to any person or property during the 15 years
3 before the occurrence alleged in this case?"
4 Were there any accidents since the occurrence
5 alleged in this case? You've indicated to see
6 Interrogatory No. 4, which you talked about the
7 Worker's Compensation claim and the lawsuit in
8 Virginia.
9 Have you fallen and hurt your right shoulder
10 since this accident with Mr. Perdue?
11 **A. No.**
12 Q. This is medical document MED-413. I'm just
13 going to give you the beginning page. It indicates a
14 shoulder contusion. What church was it that you fell
15 at?
16 **A. Christian Worship Assembly.**
17 Q. Is it correct then when you fell, you injured
18 your right shoulder?
19 **A. No.**
20 Q. Did you fall there at the Christian?
21 **A. No.**
22 Q. And when it indicates there in the report of
23 a fall, that is not correct?
24 **A. No.**
25 Q. Do you recall that fall?

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1 MR. CAMACHO: Objection. She just
2 stated she didn't fall.
3 Q. Do you recall that incident?
4 **A. Yes, I do.**
5 Q. Is that report there in that document that I
6 have given to you an accurate report of how it
7 happened?
8 **A. It's one page of it, yes.**
9 Q. Is that accurate?
10 **A. The date?**
11 Q. The description of the incident.
12 **A. No.**
13 Q. What is the accurate description of the
14 incident?
15 **A. It was ice on the ground and cars were going**
16 **round, and I picked Ethan, my grandson, up in my left**
17 **arm. I had a sling on my right arm. When I went to**
18 **open the door, I just kind of leaned up against the**
19 **car. I never fell down, down.**
20 Q. Did you fall against your shoulder?
21 **A. No.**
22 Q. The reason I ask is I have MED-414, which is
23 the follow-up for that report. My question to you
24 is, is the documentation in that as to how the
25 accident happened accurate?

EXHIBIT

21 (Pages 78 to 81)

Perdue
Witt

CTV-04-0207-WDS/LFG
February 4, 2005

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1 **A. No.**
2 Q. Do you know what hospital it was that you
3 sought treatment for?
4 **A. I don't see a name on it anywhere.**
5 Q. Were X-rays taken?
6 **A. Probably were.**
7 Q. Were X-rays taken?
8 **A. I mean, I don't recall. I'm looking to see.**
9 Q. Do you have any recollection what treatment
10 you were given?
11 **A. I don't know. Probably some pain pills and**
12 **told to protect it. I don't know.**
13 Q. Would you agree that this was an incident
14 that produced an injury to your body?
15 **A. No.**
16 Q. How would you describe it?
17 **A. I'm very protective of that shoulder. If you**
18 **hit it now, I'm going to go to see if anything's**
19 **wrong with it.**
20 Q. Why didn't you list that incident in
21 Interrogatory No. 10?
22 **A. I don't do these interrogatories.**
23 Q. The question would be: Should, in your
24 judgment, to be accurate in Interrogatory No. 10,
25 should that incident be listed?

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1 **A. Yes.**
2 Q. Did you ever get into an altercation with
3 your son and hurt your shoulder, your right shoulder?
4 **A. Can I have a second?**
5 Q. Sure.
6 **A. Not a break. I'm reading it.**
7 Q. All right.
8 **A. Okay.**
9 Q. Did you ever get into an altercation with
10 your son and hurt your shoulder?
11 **A. No.**
12 Q. This is medical document MED-400, from
13 Memorial Hospital of Martinsville on 11-30 of 2003
14 with a chief complaint of "Right shoulder injury and
15 pain"; "Brief Assessment: Got in the middle of an
16 altercation with sons. Pain in right shoulder and
17 right hand."
18 Did that happen?
19 **A. Yes.**
20 Q. To be accurate, shouldn't that have been
21 listed in answer to Interrogatory No. 10?
22 **A. Yes.**
23 MR. CAMACHO: Objection, the
24 Interrogatory No. 10 says during the 15 years
25 before the occurrence alleged in this case.

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1 MR. HILL: Follow the next one.
2 Q. Or any accident since the occurrence alleged
3 in this case. My question would be, do you recall
4 this incident?
5 **A. Yes.**
6 Q. Tell me what happened.
7 **A. My oldest son and my youngest son got into a**
8 **fight over my grandson. And I always have pain in my**
9 **shoulder, but it was my hand that was hurt.**
10 Q. Did you complain at that time of right
11 shoulder pain?
12 **A. I sure did.**
13 Q. Since this accident involving Mr. Perdue,
14 have you had lower back pain?
15 **A. I've had lower back pain all my life.**
16 Q. So the answer would be yes, you have had
17 lower back pain since this accident with Mr. Perdue?
18 **A. Yes.**
19 Q. Have you ever noticed any change in that
20 lower back pain since this accident involving
21 Mr. Perdue?
22 **A. No.**
23 Q. Have you sought treatment for lower back pain
24 since this accident with Mr. Perdue?
25 **A. Yes.**

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1 Q. Give an estimate. Since this accident
2 happened, it would have been October 20, 2001, about
3 how many times do you think you have sought treatment
4 for lower back pain?
5 **A. Since the accident?**
6 Q. Yes.
7 **A. I don't know. Probably every time I go to**
8 **the doctor.**
9 Q. And have you had any incident that has
10 increased that lower back pain since this accident
11 with Mr. Perdue?
12 **A. No.**
13 Q. Would you agree with me that your lower back
14 pain has been constant and unaffected by this
15 accident with Mr. Perdue?
16 **A. That is correct.**
17 Q. In July of 2003, were you fighting and hurt
18 your right hand?
19 **A. Yes.**
20 Q. You broke it, didn't you?
21 **A. Yes, I did.**
22 Q. And did you seek treatment?
23 **A. Yes, I did.**
24 Q. And why wasn't that injury to your right hand
25 mentioned in the Interrogatory No. 10?

22 (Pages 82 to 85)